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Supreme Court, U.S.
FILED

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

ALICIA R. HANNA
Petitioner,

vs.

TEENA FARMON; WARDEN, AND THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

RICHARD DANGLER
Counsel of Record
3112 "O" Street
Sacramento, CA 95816
Tel: (916) 737-3166

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in determining that there existed sufficient evidence of both the physical and mental components of malice to support a second-degree murder conviction?

Was the United States Court of Appeals for the Ninth Circuit correct in finding that petitioner has not established that the trial court's failure to provide a pin point instruction implicated the denial of a constitutional right?

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GENERAL OF THE STATE OF CALIFORNIA,
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PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

The petitioner ALICIA RUIZ HANNA respectfully prays that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit, entered on June 10, 1999.

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The opinion of the Court of Appeals for the Ninth Circuit, Filed June 10, 1999, affirming the district court's decision was not certified for publication, but appears in full as Appendix A to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on June 10, 1999. (See Appendix A) Petition files the instant petition within the ninety (90) day limit and this petition is therefore within the jurisdiction of this court under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title 28 U.S.C. § 2254 controlling the a writ of habeas corpus, specifically provision (d), to determine whether the decision [under question] unreasonably applied "clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d) (West Supp. 1998).

This case also involves Title 28 U.S.C.A. § 2244(d), known as the Antiterrorism and Effective Death Penalty Act.

STATEMENT OF THE CASE

This is a petition from the judgment and Memorandum of Opinion of the United States Court of Appeals for the Ninth Circuit having jurisdiction pursuant to 28 U.S.C.A. § 2253 (West Supp. 1998). In the Memorandum dated June 10, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the Central District of California. The Central District Court denied petitioner's federal petition for writ of habeas corpus challenging her conviction for one count of second degree murder and three counts of unlawful abortion.

Petitioner asserted before the Central District Court that her conviction was not sustained by sufficient evidence of the elements necessary to establish malice. Furthermore, petitioner asserted that the failure of the trial court to give a pinpoint jury instruction was a violation of petitioner's right to due process.

The Memorandum of Opinion was not certified for Publication, and was entered and filed June 10, 1999.

STATEMENT OF FACTS

At the time of the charged crimes, petitioner owned and managed a Santa Ana abortion clinic, although not a registered nurse nor physician's assistant.

On January 19, 1993, Angela Sanchez went to the clinic for abortion counseling. When petitioner informed her an abortion doctor would not be available for several days, Sanchez became distraught and said she wanted an abortion as soon as possible. At that point, petitioner offered to give Sanchez an injection of methergine to induce a miscarriage. Sanchez agreed and stated that she had no health problems or allergies to drugs.

Sanchez was provided with valium, and petitioner then prepared a syringe of methergine. Appellant had worked in family planning clinics for twelve years, and knew that methergine was used in Mexico as an abortifacient to produce miscarriages. Clinic patients sometimes requested that methergine be used to produce a miscarriage. Appellant had used methergine herself approximately eight times without adverse reaction. She did not think a methergine injection could cause death.

The only other clinic worker present was Irasema Mendoza, who saw appellant enter Sanchez's room with a syringe. Ten minutes later, appellant exited the room and announced Sanchez was "dying on her." Hanna explained that Sanchez had turned blue, foamed at the mouth and began vomiting. Mendoza began to call the paramedics, but appellant hung up the phone and asked Mendoza if she was trying to get her in trouble. Believing she could save Sanchez herself, appellant took an oxygen tank into Sanchez's room. However, the tank was empty. Appellant then called her husband,

asking him to bring oxygen to the clinic. By the time he arrived, Sanchez was dead.

Petitioner directed Mendoza to tell Sanchez's waiting children that their mother had gone to another clinic. She then drove Sanchez's car away from the clinic so it would look like Sanchez had left. Petitioner told Mendoza to return to the clinic and instructed her to tell the police a Mexican man had dropped off Sanchez's body. Appellant also said she was going to drop Sanchez's body off in Tijuana. However, Sanchez's relatives unexpectedly arrived while appellant was putting Sanchez into a car and promptly took Sanchez to the hospital.

Appellant testified she gave Sanchez valium because she was anxious about having an abortion. Sanchez remained agitated and soon began hyper-ventilating, convulsing and vomiting. Suspecting she was reacting to the valium, appellant forewent the methergine injection and began CPR. When this failed, Appellant injected Sanchez with narcan, a drug she believed to be an antidote for valium. After a futile attempt to administer oxygen, Sanchez became motionless and died.

Appellant denied seeing Mendoza on the phone or telling her not to call for help. However, she admitted failing to call the police for fear of being arrested.

Sanchez died from pulmonary edema, fluid buildup in the lungs. There was no evidence the condition was caused by disease or injury. Rather, the evidence was indicative of Sanchez having suffered a toxic reaction to a drug injection. The

autopsy revealed three needle marks on her arms which were made shortly before her death. Doctors were unable to determine which particular drug caused the edema, but valium, narcan and most street narcotics were effectively ruled out as the cause of death.

REASONS FOR REVERSING THE LOWER COURTS

I.
THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO ESTABLISH THE TWO ELEMENTS OF THE MALICE OF SECOND-DEGREE MURDER.

The Court of Appeal affirmed the District Court and rejected petitioner's argument that there was insufficient evidence to support her conviction for second degree murder, concluding "[A]ny rational trier of fact could have found" the requisite implied malice "beyond a reasonable doubt." (See Appendix A.)

The Court of Appeals concluded a reasonable jury could have found petitioner's actions at the time of Sanchez's death constituted conduct so implicitly harmful as to satisfy both the physical and subjective requirements of the proof of implied malice. However, petitioner asserts close consideration of the California law of implied malice negates such a conclusion.

Under California law, implied malice may only be established where a defendant is found to have acted with "a wanton disregard for life...and the facts demonstrate a subjective awareness of the risks created." (People v. Brown 35 Cal.App.4th 1585, 1598 (1995).) Therefore, an implied malice finding necessarily includes both a physical and mental component. The facts in this case however fail to meet either the physical or the mental component of implied malice.

The physical component of malice is "satisfied by the performance of an act, the natural consequences of which are dangerous to human life." (People v. Patterson 49 Cal. 3rd 615, 626 (1989); See, also, People v. Watson 30 Cal.3d 290, 300 (1981).) The meaning of an "inherently dangerous" act is well established in the implied malice context. An act is inherently dangerous when there exists a "high probability that it will result in death." People v. Patterson, supra, 49 Cal.3d at pp. 626-627.

The evidence presented failed to show that there is a high probability of death associated with the injection of methergine as a intended abortifacient. Even more certainly, the evidence failed to show that there is a high probability of death associated with the administration of drugs in preparation for an abortion, the conduct at issue here.

Among petitioner's functions at the clinic was the administration of valium for the clinic physicians prior to the abortions. Methergine is commonly

used as an abortifacient in Mexico. Petitioner had previously used it approximately eight times without adverse result. To the extent the Court of Appeals found petitioner likely to have taken these steps, the steps can not reasonably be deemed inherently dangerous.

Even if it is argued that the physical component has been satisfied, appellant does not satisfy the required mental component of malice. The mental component it satisfied only when the defendant,

"knowing that his conduct endangers another, nonetheless acts deliberately with a conscious disregard for life. Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence...[A] finding of *implied malice depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard.* (People v. Watson, 30 Cal3d 290, 296-297 (1981), emphasis added.)

The mental element of implied malice requires that the defendant both subjectively be aware of the substantial risk of death and wantonly ignore that risk.

Here, in attempting to treat Sanchez, petitioner did not proceed in the face of substantial, known risks, but rather performed what to her appeared to be relatively routine, non-dangerous

procedures. The unusual and unforeseen consequence of the administration of the common anti-anxiety drug valium - that Sanchez would suffer an allergic reaction – does not establish that appellant gave that drug to Sanchez in the face of a high probability of her death.

The evidence in the case at hand does not establish either that appellant was subjectively aware of any potential risks involved in her conduct or that she consciously chose to ignore those perceived risks. Angela Sanchez died from an allergic reaction to a drug appellant had administered. Appellant was unaware that Sanchez had any potential allergies, and had administered drugs to herself and to others on many occasions without adverse result. Sanchez did not inform appellant that she had any allergies. Appellant did not believe it was possible to die from an injection of valium, narcan, or methergine. As appellant had no subjective knowledge of the risks involved, she could not have chosen to ignore those known risks.

Furthermore, once petitioner saw that Sanchez was experiencing complications, she took steps which she believed were appropriate. She injected Sanchez with narcan, which she had believed was an antidote to allergic reactions to valium. Even as that step failed, she still subjectively believed she could save Sanchez. Even assuming that clinic employee Mendoza's testimony was true, petitioner's response shows clearly that she believed she could "save" Sanchez herself, and attempted to give Sanchez CPR and oxygen.

Furthermore, there is no evidence to suggest that appellant realized the clinic did not have a proper store of oxygen, nor that appellant had any control in that aspect of managing the clinic.

Thus, the evidence, considered in the light most favorable to the prosecution, shows only that appellant acted with no more than gross negligence. The evidence does not show the depth of indifference required to show she endangered the life of Sanchez and knowingly, consciously disregarded that endangerment.

Sanchez may have died as a result of petitioner's limited medical knowledge, and her honest but misplaced faith in her own ability to save Sanchez. This however shows no more than appellant's gross negligence. Gross negligence in performing an otherwise safe procedure is repugnant, however it is not an inherently dangerous act with a high probability of death and taken in a conscious indifference to that high probability.

The Court of Appeals thus erred in finding that there was sufficient evidence to establish second degree murder. As stated above, petitioner did not undertake an inherently dangerous act having a innate high probability of death nor did appellant consciously disregard any perceived risks in pursuing her conduct.

II.
THE COURT OF APPEAL ERRED IN FINDING PETITIONER FAILED TO ESTABLISH DEPRIVATION OF A

CONSTITUTIONAL RIGHT AS TO THE TRIAL COURT'S FAILURE TO PROVIDE A PINPOINT INSTRUCTION.

The United States Court of Appeal affirmed the Central district court in denying petitioner's claim on the conclusion that appellant had not "made a substantial showing of the denial of a constitutional right." Petitioner asserts that the trial court's failure to adhere to the requirements and procedures established under state law constituted a violation of her constitutional right to due process.

The failure to provide a pinpoint jury instruction on an issue hanging on intricate legal distinction and ripe for jury confusion was an abrogation of appellant's right to due process. (People v. Bacigalupo (1991) 1 Cal.4th 103, 128.) Here, the jury instruction failed to address a forbidden inference under California law, and where that forbidden inference was the foundation of the petitioner's conviction, that conviction is infected.

Under California law, a defendant is entitled to a jury instruction that pinpoints the theory of the defense. People v. Wright, 45 Cal. 3d 1126, 1137 (1988). The right to a pinpoint instruction is of particular importance where an issue or evidence would likely be misunderstood or misapplied by the jurors. Where the probative value of post-crime consciousness of guilt evidence is at issue, the distinction between permitted and forbidden inferences is certainly a confusing issue for a jury. There lies a particularly subtle legal distinction

between the permitted use of post-crime consciousness of guilt to determine the defendant's guilt and the forbidden inference from post-crime consciousness of guilt to the degree of the underlying crime, where the degree determination depends solely on the defendant's pre-crime state of mind. Where such subtle distinctions are likely to seem ambiguous to a jury, it is error to refuse a pin point instruction clearly explaining the true evidentiary value and purposes of such evidence. People v. Daniels, 52 Cal.3d 815, 871 (1982). As such, appellant's due process rights were violated by the court's refusal to provide a pin point jury instruction on the matter of the distinct uses of post-crime consciousness of guilt evidence.

As the jury panel was asked to deliberate on and determined whether appellant acted in a wanton disregard for the inherent danger of her conduct, the jury was directed to determine whether appellant perceived and disregarded known risks. The jury was therefore being asked to determine the degree of petitioner's crime by relying on her post-crime consciousness of guilt evidence. Without evidence of statements made to Mendoza and other witnesses, attempting to cover up her crime, the jury could not have found a second-degree murder conviction. As such, the trial court's refusal to direct the jury away from such an inference based on these post-crime acts served to direct the jury's determination to a second-degree finding. As a determination of guilt is the essence of a criminal trial, any violation of the defendant's ability to assert defense strategies and

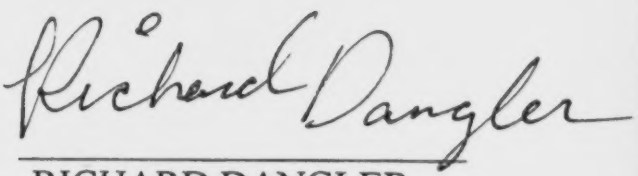
evidence recognized under state law necessarily infects the integrity of the conviction such that due process is violated.

As such, the Court of Appeals erred in affirming the District Court and finding that petitioner failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West Supp. 1998.)

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit in this matter.

CORRECTED: November 10, 1999



RICHARD DANGLER
Counsel of Record

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALICIA HANNA, a/k/a Alicia Ruiz Hanna,	)	No. 98-56002
Petitioner-Appellant	)	D.C.NO. CV-98-00689-R-RNB
v.	)	MEMORANDUM
TEENA FARMON; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DANIEL LUNGREN,	)	FILED June 10, 1999
Respondents-Appellees.	)	

Appeal from the United States District Court
For the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted Monday June 7, 1999
Pasadena, California

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

Before: D.W. NELSON, REINHARDT, and TROTT, Circuit Judges.

Petitioner Alicia R. Hanna appeals the district court's denial of her 28 U.S.C. § 2254 habeas petition challenging her conviction for one count of second degree and three counts of unlawful abortion. We affirm the district court.

Because the petition was filed after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies. See Jeffries v. Wood, 103 F.3d 787, 790 (9th Cir. 1996) (en banc). Hanna's claims were adjudicated on the merits in a state court proceedings [sic]. We thus review for whether the decision unreasonably applied "clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d) (West Supp. 1998).

First, Hanna claims that the evidence of malice was insufficient to support her second degree murder conviction. We disagree. "[A]ny rational trier of fact could have found" the existence of malice "beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Under California law, "implied malice may be found when a defendant, knowing that his or her conduct endangers life and acting with conscious disregard of the danger, commits an act the natural consequences of which are dangerous to life." People v. Roberts, 2 Cal.4th 271, 317 (1992); accord People v. Brown, 35 Cal.App.4th 1585, 1598 (1995)

("[W]here the evidence establishes a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied." (internal quotations committed)). Here, sufficient evidence exists for a rational juror to have found both the "physical" and "mental" components of malice.

With respect to the "physical" component, ample evidence exists for a jury to have found that Hanna's conduct demonstrated a "wanton" disregard for life." Brown, 35 Cal.App.4th at 1598. First, as found by the district court and state court of appeals, a person without medical training injecting someone with methergine creates a risk of life, a risk exacerbated by Hanna failing to stock the office with life-saving supplies. Second, even if these risks could be considered insufficient to show wanton disregard, a arational jury could hve believed that Hanna actively prevented the vicitm from obtaining medical assistance when dying. Although Hanna disputed a co-worker's testimony that she prevented the co-worker from calling 911, the jury could have believed this testimony over hanna's. Any rational jury could have found that preventing a 911 call when the victim admittedly was blue, foaming at the mouth, and vomiting deminstrates a "wanton disregard for life." Id.

Similar evidentiary support exists for the "mental" component of malice. The jury heard testimony from a doctor who worked at the clinic that he had instructed Hanna to call 911 when life-threatening problems arose with patients. Any

rational jury could have chosen to believe this testimony, and find that Hanna was subjectively aware of the need to obtain emergency medical assistance for the victim. See id. We thus hold that sufficient evidence existed to support the finding of malice and affirm the district court on this point.

Second, Hanna argues that the failure to give the jury a pinpoint jury instruction on post-crime consciousness of guilt violated due process. We disagree. The district court denied the Certificate of Appealability (COA) on this issue and Hnna has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West Supp. 1998).

Effective January 1, 1999. and thus after the briefing of this case, the Ninth Circuit amended its rules for partial denials of COAs. This Circuit now requires that petitioners seeking broader certification after a partial denial of a COA must separately file a motion for broader certification with a statement of reasons within thirty-five days of the entry of the denial. See 9th Cir. R. 22-1(d). We need not reach the applicability of hte amendments however because Hanna has not made "the substantial showing required by § 2253(c)(2) that [s]he has been denied a constitutional right." United States v. Cruz-Mendoza, 163 F.3d 1149, 1149 (9th Cir. 1998) (amending 147 F.3d 1069 (9th Cir. 1998)).

Hanna fails to raise any "clearly established Federal law, as determined by the Supreme Court," as required by AEDPA, to support her claim of a constitutional due process requirement for a pinpoint

jury instruction. 28 U.S.C. § 2254(d) (West Supp. 1998). Even if California law requires such an instruction, "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (internal quotations omitted). Beyond a state court reference to due process with respect to pinpoint jury instructions, see People v. Bacigalupo, 1 Cal.4th 103, 128 (1991), Hanna fails to provide any support for a federal constitutional right to receive the pinpoint instruction. We thus find a failure to make a substantial showing of a constitutional violation and affirm the district court on this point.

Affirmed.

LODGED April 13, 1998
Clerk of the U.S. District Court
Central District of California
By Deputy Clerk

FILED May 5, 1998

ENTERED May 6, 1998

I HEREBY CERTIFY THAT THE DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL OF RECORD AT THEIR RESPECTIVE MOST RECENT ADDRESS IN THIS ACTION ON THIS DATE. DATED: May 6, 1998 "s/(initials)__"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Alicia Ruiz Hanna,	Case No.: CV 98-0689-R (RNB)
Petitioner,	
vs.	JUDGMENT
Teena Farmon, Warden, et al.,	
Respondent.	

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: May 4, 1998

"s/Manuel L. Real".
UNITED STATES DISTRICT JUDGE

Filed Clerk U.S. District Court
April 13, 1998
Central District of California

UNITED STATES CENTRAL DISTRICT OF CALIFORNIA

Alicia Ruiz Hanna,	)	Case No.: CV 98-0689-R (RNB)
Petitioner,	)	
vs.	)	REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
Teena Farmon, Warden, et al.,	)	
Respondent.	)	

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On January 28, 1998, petitioner filed a Petition for Writ of Habeas Corpus by a person in State Custody ("Pet.") herein, accompanied by a Statement of Facts and Memorandum of Law ("Pet.

Mem.") and compendium of exhibits. Respondents filed their Answer ("Ans.") on March 10, 1998, to which petitioner filed a Traverse ("Trav.") on April 6, 1998. Thus, this matter now is ready for decision.

BACKGROUND

On October 29, 1993, a Los Angeles Superior Court jury found petitioner guilty of one count of second degree murder and three counts of unlawful abortion. (See 4 Clerk's Transcript ["CT"] 1501-03-A, 1505-07). The trial court subsequently sentenced petitioner to a total state prison term of sixteen years and four months to life. (See CT 1543-45, 1548-49; 18 Reporter's Transcript ["RT"] 4158-59).

Petitioner timely appealed her conviction to the California Court of Appeal, raising essentially the same claims as those asserted in the petitioner herein.[1] (See Pet. Exh. C). The California Court of Appeal affirmed the conviction in an

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[1] Respondent's contend the petitioner technically has failed to exhaust her state remedies with respect to her two claims, because both were presented to the state courts as alleged violations of state law, rather than as alleged federal constitutional violations. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). However, respondents have requested that the Court nevertheless deny petitioner's claims on the merits, as 28 U.S.C. § 2254(b)(2) authorizes the Court to do.

unpublished opinion filed November 26, 1996. (See Pet. Exh. B). Petitioner then filed a Petition for Review with the California Supreme Court which also raised essentially the same claims as those contained in the Petition herein. (See Pet. Exh. A). The California Supreme Court summarily denied the Petition for Review without citation of authority on January 28, 1997. (See respondents' Notice of Lodgment Item No. 1).

SUMMARY OF EVIDENCE ADDUCED AT TRIAL RELATING TO FATAL ABORTION

Both of petitioner's claims herein are directed to her second degree murder conviction, which was based on a fatal abortion. Since petitioner is contesting the sufficiency of the evidence underlying that conviction, the Court has independently reviewed the state court record. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). Based on that review, however, the Court adopts the following recitation from the California Court of Appeal opinion, as a concise and accurate summary of the evidence adduced at trial relating to the fatal abortion. The Court notes that petitioner has adopted this recitation as her own statement of facts. (See Pet. Mem. At 2-4.)

"Hanna owned and managed a Santa Ana abortion clinic. Although a phlebotomist licensed to draw blood and give injections, she was not a

registered nurse nor physician's assistant. In fact, Hanna had never attended medical or nursing school.

"On January 19, 1993, Angela Sanchez went to Hanna's clinic for abortion counseling. When Hanna informed her an abortion doctor would not be available for several days, Sanchez became distraught and said she wanted an abortion as soon as possible. At that point, Hanna offered to give Sanchez an injection of methergine to induce a miscarriage. Hanna knew this would be practicing medicine without a license, but she felt sorry for Sanchez and wanted to help her. Sanchez agreed to the procedure.

"Conflicting testimony was offered as to what transpired next. Clinic worker Irasema Mendoza[2] saw Hanna enter Sanchez's room with a syringe. Ten minutes later, Hanna exited the room and announced Sanchez was "dying on her." Hanna explained Angela turned blue, foamed at the mouth and vomited when she injected her with anesthesia. Mendoza began to call the paramedics, but Hanna hung up the phone and accused Mendoza of trying to get her in trouble. Proclaiming she could save Sanchez herself, Hanna took an oxygen tank into Sanchez's room. However, the tank was empty. Hanna then called her husband, asking him to bring oxygen to the clinic. By the time he arrived, Sanchez was dead.

"Hanna directed Mendoza to tell Sanchez's waiting children their mother had gone to another clinic. She then drove Sanchez's car away from the

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[2]Mendoza testified under a grant of immunity.

clinic so it would look like Sanchez had left. Later that night, Hanna had Mendoza return to the clinic and instructed her to tell the police a Mexican man had dropped off Sanchez's body. Hanna also said she was going to dump Sanchez in Tijuana. However, Sanchez's relatives unexpectedly arrived while Hanna was putting Sanchez into a car and promptly took Sanchez to the hospital.

"Hanna testified she gave Sanchez valium because she was anxious about having an abortion. Sanchez remained agitated and soon began hyper-ventilating, convulsing and vomiting. Suspecting she was reacting to the valium, Hanna forewent the methergine injection and began CPR. When this failed, Hanna injected Sanchez with narcan, an antidote for narcotics[3]. After a futile attempt to administer oxygen, Sanchez became motionless and died.

"Hanna denied seeing Mendoza on the phone or telling her not to call for help. However, she admitted failing to call the police for fear of being arrested. Hanna had planned to drop off Sanchez's body at the hospital that night, but Sanchez's relatives preempted her. Hanna went to the hospital too, but she did not tell authorities what had occurred at her clinic.[4]

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[3] Hanna testified she made several injections to administer the narcan because of difficulty locating a vein in Sanchez's arm.

[4] Instead, Hanna made up a story that she sent Sanchez to another clinic only to have a man return her body to the clinic later that evening. Hanna told her friend, Kathy Cervantes,

Sanchez died from pulmonary edema, fluid buildup in the lungs. There was no evidence the condition was caused by disease or injury. Rather, the evidence was indicative of Sanchez having suffered a toxic reaction to the a injection. The autopsy revealed three needle marks on her arms which were made shortly before her death. Doctors were unable to determine which particular drug caused the edema, but valium, narcan and most street narcotics were effectively ruled out as the cause of death."[5] (Pet. Exh. B at 2-4).

PETITIONER'S CONTENTIONS

1. The evidence presented at trial was insufficient to establish the malice element of second degree murder. (See Pet. at ¶ 10a; Pet. Mem. At 6-10; Trav. At 3-7).

2. Petitioner's right to due process was violated when the trial court refused to give a pinpoint jury instruction requested by petitioner concerning post crime consciousness of guilt. (See Pet. at ¶ 10b; Pet. Mem. At 10-12; Trav. At 7-9).

Sanchez had returned to her clinic after having an abortion in Tijuana.

[5] Numerous other drugs, such as methergine, were not tested for due to limitations inherent in the toxicology screening equipment.

DISCUSSION

Thus, under § 2254(d), the federal court must first determine whether there is a qualifying state court decision. If there is a qualifying state court decision, the federal court must determine whether (a) the decision was contrary to clearly established federal law, as determined by the United States Supreme Court, or (b) the decision involved an unreasonably application of clearly established federal law, as determined by the United States Supreme Court.

The decision of the California Court of Appeal on direct appeal constitutes the qualifying state court decision, for purposes of § 2254(d). Under Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3, 111 S. Ct. 2590, 115 L.Ed.2d 706 (1991), it may be presumed that the California Supreme Court, by its silent denial of the Petition for Review raising the same claims, did not intend to change the appellate court's reasoned decision rejecting petitioner's claims. See Ylst, 501 U.S. at 803-04.

A. Habeas relief is not warranted with respect to petitioner's insufficiency of the evidence claim.

The California standard for determining the sufficiency of evidence to support a conviction has been held by the California Supreme Court to be identical tot he federal standard enunciated by the United States Supreme Court in Jackson v. Virginia,

443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). See People v. Johnson, 26 Cal.3d 557, 576, 162 Cal. Rptr. 431, 606 P.2d 738 (1980). Under this standard, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319 (emphasis added). In making this determination, the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see also Jackson, 443 U.S. at 319, 324, 326.

It appears from the California Court of Appeal opinion that this was the same standard applied by the Court of Appeal in determining whether the evidence was sufficient to support petitioner's conviction for second degree murder. (See Pet. Exh. B at 8).

Under California law, as the Court of Appeal observed, "second degree murder based on implied malice has been committed when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life[.] Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard

for human life." People v. Watson, 30 Cal.3d 290, 300, 637 P.2d 279, 179 Cal.Rptr.43 (1981) (citations and internal quotation marks omitted).[6]

Petitioner contends that, because the preparation to perform an unlawful abortion was not an inherently dangerous act, the evidence was insufficient to establish that her actions satisfied the "physical component" of implied malice. (See Pet. Mem. at 6-8). The California Court of Appeal reasoned otherwise:

"Despite her lack of medical training, Hanna took it upon herself to inject patients with methergine to induce abortions. Methergine causes uterine contractions but is relatively ineffectual as an abortificient.[7] *It is also known to cause high blood pressure, excessive bleeding and infection. Hanna knew about these dangers but considered methergine relatively 'safe' because it is commonly used in Mexico.*

"Hanna also familiar with the equipment and supplies necessary to resuscitate a patient in distress, such a plastic airway and ambu bag. These devices allow oxygen to be properly delivered to a person experiencing respiratory problems. By not having

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[6] The jury was given an instruction to the foregoing effect (which was based on CALJIC No. 8.31), as well as instructions regarding involuntary manslaughter and the difference between murder and manslaughter. (See 4 CT 1464, 1470, 1471, 1473, 1474; 18 RT 4074, 4078-79, 4080-81).

[7] One doctor estimated the success rate of methergine induced abortions "would be less than 20 percent".

them on hand, there was little Hanna could do to resuscitate Sanchez, even if she had oxygen available. Hanna also failed to stock certain cardiac drugs used in medical emergencies, which further endangered her patients' lives.

"Hanna did more than simply create a potential danger to her patients, however. In Sanchez's case, Hanna actually prevented Mendoza from calling the paramedics when it was clear the patient was dying. Doctors had instructed Hanna it was imperative to call 911 for patient emergencies. Had she done so, a paramedic team could have arrived at the clinic within four to six minutes to assist Sanchez. A physician specializing in emergency medicine and toxicology believed the paramedics could have saved Sanchez, noting 'there is no reason to believe' Sanchez's condition could not have been 'quickly reversed.'" (Pet. Exh. B at 9).

Based on its own independent review of the record, the Court concurs with the foregoing characterization of the evidence, as well as the foregoing reasoning. Indeed, it appears that, for the most part, the evidence cited by the California Court of Appeal was no disputed by petitioner at trial and is not disputed by her now. Petitioner did dispute Mendoza's testimony to the effect that petitioner had prevented Mendoza from calling the paramedics.[8]

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[8] According to Mendoza, after petitioner came out of the examination room and told Mendoza that the patient had suffered a reaction to the anesthetic and was dying, Mendoza picked up the telephone and informed petitioner she was

However, under the authorities cited above, the Court must assume that the jury chose to believe Mendoza's testimony over petitioner's.

Petitioner further contends that, even if her actions satisfied the "physical component" of implied malice, the evidence was insufficient to establish that her actions satisfied the "mental component." In this regard, petitioner maintains that she was not aware of any inherent risk of death in her conduct and therefore could nor have consciously disregarded such risk. (See Pet. Mem. at 8-9). The California Court of Appeal reasoned, however, that petitioner's actions in failing to seek assistance and preventing Mendoza from doing so showed the requisite heartless indifference. (See Pet. Exh. B at 9). Further, the Court of Appeal reasoned, the fact that petitioner may not truly have intended to kill the victim did not preclude a finding of malice"

> "*As we explained in Protopappas, 'In ordinary conversations the word 'malice' conveys some notion of hatred, grudge, ill-will, or spite, but no such limitation is incorporated in the legal concept of 'malice aforethought.' Many murders are committed to satisfy a feeling of hatred or grudge, it is true, but*

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going to call the paramedics. Petitioner then took the phone from her and hung up; petitioner said she was going to save the patient and asked Mendoza why she was trying to get petitioner in trouble. (10 RT 2314-18, 2325-26, 2339-40). Petitioner denied that Mendoza attempted to call 911. (See 13 RT 3152.)

his crime may be perpetuated without the slightest trace of personal ill will." [Citation.]' (Id. at p. 172.) Regardless of Hanna's intentions for not seeking assistance, there can be little doubt her conduct evinced extreme indifference to and subjective awareness of Sanchez's perilous condition. Accordingly, we uphold the jury's verdict of second degree murder." (Pet. Exh. B at 10).

Again, based on its own independent review of the record, the Court concurs with the California Court of Appeal's reasoning. As noted above, the Court must assume that the jury chose to believe Mendoza's testimony that petitioner prevented Mendoza from calling the paramedics. Moreover, although petitioner now contends that "there is no evidence that she had subjective knowledge that [calling for emergency assistance] was necessary" (See Pet. Mem. at 9), the Court must assume that the jury drew a different inference from the testimony of Dr. Cappelli[9]

B. Habeas relief is not warranted with respect to petitioner's instructional error claim.

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[9] Dr. Cappelli was the obstetrician/gynecologist who had performed therapeutic abortions at petitioner's clinic 3 or 4 times a month from 1991 through 1993. (See 5 RT 1285-86; 6 RT 1650). He also testified under a grant of immunity. (See 5 RT 1324-25).

Petitioner contends that the trial court violated her due process rights when it refused to give the following pinpoint instruction requested by petitioner:

"The defendant's consciousness of guilt, if any, is relevant upon the questions of whether the defendant was afraid of being apprehended and whether the defendant thought she had committed a crime [or crimes]. Consciousness of guilt may not be considered in determining the degree of defendant's guilt or in determining which of the charged offenses the defendant committed." (See Pet. at ¶ 10b; Pet. Mem. at 10-12; pet. Exh. E).

When petitioner raised this claim on direct appeal, and again in her Petition for Review, petitioner did not contend that the trial court's refusal to give the foregoing instruction constituted a violation of her federal due process rights. Rather, petitioner merely argued that she was entitled to this instruction, as a matter of California law, based on California case authority. (See Pet. Exh. C at 44-45; pet. Exh. D at 3-5; Pet. Exh. A at 14-18). In rejecting this claim, the California Court of Appeal reasoned that the trial court had properly rejected the proposed instruction, since it was not a correct statement of California law. (See Pet. Me. Exh. B at 11).

Habeas relief is not available for an alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). To the extent that petitioner merely is claiming that the requested instruction should have been given as a matter of California law, this claim is not cognizable on federal

habeas review. See Estelle, 502 U.S. at 71-72. A claim that a trial judge erred by omitting an instruction is cognizable on federal habeas review only if the petitioner can show that the omission so infected the entire trial that the resulting conviction violated due process. See Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L.Ed.2d 203 (1977). "Where the alleged error is the failure to give an instruction, the burden on the petitioner is 'especially heavy'." Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (quoting Henderson, 431 U.S. at 155). The significance of the omitted instruction must be evaluated by comparing it to the instructions that actually were given. Henderson, 431 U.S. at 154.

Here, the record reflects that the trial court gave the following instructions on consciousness of guilt, based on CALJIC Nos. 2.03 at 2.06:

> "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime for which she is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.
>
> "If you find that a defendant attempted to suppress evidence against herself in any manner, such as by concealing evidence, such attempt may

be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient in itself to prove guilt, and its weight and significance, if any, are matters for your consideration." (4 CT 1412-12; 17 RT 4047).

Petitioner contends that "[i]t is error to instruct a jury that consciousness of guilt can support the inference of a particular mental state or degree of culpability." (See Pet. Mem. at 12). However, in the case cited by petitioner for this proposition, People v. Bacigalupo, 1 Cal.4th 103, 820 P.2d 559, 2 Cal.Rptr. 335 (1991),[10] the California Supreme Court rejected the very argument now being made by petitioner-i.e., that the consciousness of guilt instructions based on false statement (CALJIC No. 2.03) and flight (CALJIC No. 2.52) which had been given by the trial court denied the petitioner due process of law by permitting the jury to consider consciousness of guilt by determining the degree of the homicides. The California Supreme Court held that the instructions "did not suggest to the jurors that they could infer any mental state or degree of culpability from consciousness of guilt." See 1 Cal. 4th at 128. The Court concurs. Accordingly, the Court finds and concludes that petitioner has not met her "especially heavy" burden of establishing that the failure to give

[10] The judgment in Bacigalupo was vacated by the Supreme Court on unrelated grounds in Bacigalupo v. California, 506 U.S. 802, 113 S. Ct. 32, 121 L.Ed.2d 5 (1992).

her requested pinpoint instruction "so infected the entire trial that the resulting conviction violated due process."

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the District Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: April 13, 1998

"s/Robert N. Block"
UNITED STATES MAGISTRATE JUDGE